

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3448 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

=====

1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

MAHALAXMI BHAVAN COOPERATIVE SOCIETY LTD.

Versus

A'BAD MUNICIPAL CORPORATION

Appearance:

MR MC BHATT for Petitioner

MR RM CHHAYA for Respondent No. 1

RULE Served on respondent No. 2

MS. HARSHA DEVANI, AGP, for Respondent No. 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: /11/1999

C.A.V. JUDGEMENT

The prayer of the petitioner in this petition is firstly to quash direction of the Ahmedabad Municipal Corporation respondent No. 1 contained in clause No. 26 of Annexure-C to keep 20 per cent land open and secondly to issue a writ of mandamus directing respondent No. 1 Corporation to permit the petitioner to put up

construction on the 20 per cent land which has been kept open at present as per plan submitted by the petitioner on or about 13.5.1997 in respect of land bearing final plot No. 12/1 of the Town Planning Scheme No. 18 of City of Ahmedabad.

2. The petitioner, a registered Co-operative Society, is owner of final Plot No. 12/1 of Town Planning Scheme No. 18. This land forms part of original survey No. 20/1 of village Shaher Kotada, District Ahmedabad. After division of final Plot No. 12, 31102 sq. mtrs. of land remained with the petitioner which is designated as new Final Plot No. 12/1. The petitioner sought permission for development of the land and for putting up construction of various building permissible under the T.P. Act and Bombay Municipal Corporation Act. The petitioner complied with all formalities because the Ahmedabad Municipal Corporation did not grant permission for development of the land as per details given in annexure-C clause (26) indicating keeping 20 per cent land open. However, crores of rupees were at stake and therefore without prejudice to the contention of the petitioner it submitted revised plans in compliance with clause (26) and necessary permissions were granted on 13.11.1997. In this petition the petitioner has challenged the action of the respondent No. 1 Corporation directing the petitioner to keep 20 per cent land as vacant and open and refusal to grant permission for the entire area of land including 20 per cent. It is also stated that the petitioner has been singled out and discriminated inasmuch as in the past the respondent No. 1 Corporation did not insist in any particular case directing reserving certain percentage of open land.

3. The respondent Corporation in the counter affidavit has stated that the fundamental right or any legal right of the petitioner is not violated, hence this petition is not maintainable. On merits it is stated that the land was formerly part of the Textile Mill and is situated in the heart of the city of Ahmedabad. When Town Planning Scheme was prepared and published by the Ahmedabad Municipal Corporation the Textile Mill was in existence and therefore in order not to disturb the existing Textile Mill no change in the area of the plot in question was made while sanctioning the Town Planning Scheme and the original plot was kept intact. The Textile Mill was closed, hence it was planned to convert the said land from industrial use to commercial use. The petitioner is subsequent owner of the land in question. As per the regulations and as per the building bye-laws,

provision for public amenities as well as safety were to be made. When the Textile Mill existed the burden on the use of land was of such nature that no common facilities like parking, provision for open space etc. were necessary to be provided. Since the petitioner has submitted plans for development of the land raising commercial complexes, it would increase the burden on the land in question as regards the actual use of the land and therefore it is necessary to make provision for public amenities as stated above. The condition for 20 per cent land open was placed under these circumstances which has been agreed upon by the petitioner to the effect that any such development to be made would be subject to leaving 20 per cent land for public amenities, in case of future varied scheme. Under Regulation No. 16 and also according to the Corporation the decision taken for reservation of 20 per cent land open is as per the revised draft development plan published by AUDA and as per the direction reservation of 20 per cent land open is legal. Thereafter, series of rejoinder affidavits were filed by the petitioner.

4. Learned counsel for the petitioner Shri M.C. Bhatt and Shri R.M. Chhaya for respondent No. 1, and the learned A.G.P. were heard. None appeared on behalf of respondent No. 2. From para 5 of the writ petition it is clear that the petition is restricted to only clause (26) of Annexure-C directing the petitioner to keep 20 per cent land as open land. It appears from Annexure-C that the application of the petitioner was rejected on numerous grounds numbering 42. Out of these grounds, ground No. 26 alone is under challenge which provides that building plan be submitted by showing 20 per cent land open in terms of BNS/00/52/205. In order to appreciate the challenge to this ground it should be kept in mind that the grant of writ whether in the nature of certiorari or mandamus is discretionary. If party has agreed to keep 20 per cent land open the question is whether he should be permitted to resile from such agreement and whether the action of the Corporation respondent No. 1 insisting that 20 per cent land be kept open in revised plan is illegal and should be quashed. In the synopsis in the writ petition which is also part of the record it is mentioned on behalf of the petitioner that since crores of rupees were at stake, therefore, without prejudice to the contention of the petitioner it submitted revised plans in compliance with clause (26) and necessary permission was granted on 13.11.1997. This is an admission on behalf of the petitioner. If terms indicated in clause (26) of the annexure-C were agreed upon and revised plan was sanctioned and permission was

granted on 13.11.1997 it can hardly be said that the action of the respondent No. 1 in pressing the petitioner to keep 20 per cent land open is illegal and contrary to law. In para 6 of the writ petition it is mentioned that the petitioner's project of crores of rupees would have come to a grinding halt and would have created insurmountable difficulties to the members of the co-operative society, therefore, without prejudice to the contention of the petitioner, it submitted a revised plan in compliance with clause (26) of annexure-C. However, it is nowhere indicated from any correspondence from the side of the petitioner that he submitted revised plan in compliance with clause (26) of annexure-C without prejudice to its contention. As against this, in the counter affidavit of Shri Shivanand Zha on behalf of the respondent No. 1 it is deposed in para 6 that while sanctioning the building plan the Municipal Corporation has specifically kept the condition which has been agreed upon by the petitioner to the effect that any such development would be subject to leaving 20 per cent of land for public amenities in case of future varied scheme and the petitioner agreed upon the same. It was thus an agreement from the side of the petitioner that he will keep 20 per cent land open. In the rejoinder affidavit dated 21.9.1998 the petitioner has resiled from this agreement which appears in para 6 of the rejoinder affidavit. In view of this it is clear that earlier the petitioner agreed unconditionally to leave 20 per cent land open. No such condition was placed before the Corporation in the revised plan so submitted by the petitioner that it was without prejudice to the contentions of the petitioner. If this was so then in face of the agreement of the petitioner, he is estopped from challenging the action of the Corporation in incorporating clause (26) in annexure-C. The conduct of the petitioner in first admitting the agreement and then resiling from it altogether in the rejoinder affidavit disentitles him from discretionary relief from this court in the nature of writ of certiorari or mandamus.

5. Shri M.C. Bhatt contended that condition No. 26 amounts to compulsory acquisition of petitioner's 20 per cent land and depriving the petitioner of this area of land, I do not find any force in this contention. Condition in clause (26) of annexure-C neither amounts to acquiring the land of the petitioner nor a portion of petitioner's land nor it can be said that the petitioner is being deprived of his land. On the other hand in the background of the facts of the case, it appears that since originally the public at large had hardly any access to the land of the Textile Mill there was no need

for the Corporation to provide public amenities. After the Textile Mill was closed the land was converted from industrial use to commercial use and if commercial complex was to be constructed or has been constructed naturally public at large would be visiting such complex and as such public amenities have to be provided by the Corporation. Further the land is situated in the heart of the city. Shri Chhaya rightly contended that the land is situated in a very densely populated area and if adequate reservation for public amenities is not made in future public would suffer at large. It is therefore not a case where the Corporation is vindictive against the petitioner. Personal interest of the Corporation is hardly involved in introducing clause (26) in annexure-C. On the other hand this clause was introduced keeping in view larger public interest and facilities which are to be provided by the Corporation to the public at large. For the aforesaid reasons the action of the Corporation cannot be said to be illegal.

6. Shri M.C. Bhatt learned counsel for the petitioner however argued that since Town Planning Scheme was finalised in the year 1961-62 under the Bombay Town Planning Act which acquired force of law hence such scheme can not be altered except under the authority of law. He further contended that belated counter-affidavit annexure-C enclosing two resolutions of the Corporation would not validate illegal action of the respondent Corporation. He further contended that the impugned order was passed on 13.5.1997 and since the ground which has been taken in additional counter affidavit of respondent No. 1 dated 14.10.1999 did not exist on 13.5.1997, hence action of the Corporation cannot be validated on this ground. I again do not find any force in this contention. Since the petitioners agreed to keep 20 per cent of land open in case of future variation of the scheme as disclosed in para 6 of the counter affidavit of the Corporation, whenever future variation is to be made the Corporation could have insisted the petitioner to leave 20 per cent of land open. The variation of the scheme has become essential by the change of purpose namely use of land from industrial purpose to commercial purpose. Section 71 of the Gujarat Town Planning and Urban Development Act 1976 provides that notwithstanding anything contained in Section 70, a town planning scheme at any time may be varied by a subsequent scheme made, published and sanctioned in accordance with the provisions of this Act. Thus the power of variation of earlier sanctioned scheme is contained in Section 71 of the Gujarat Town Planning and Urban Development Act, 1976. It seems that in exercise

of this power the respondent Corporation is taking action through resolution No. 33 and 384 annexure IIA and IIB whereby the Corporation has authorised the Municipal Commissioner to undertake consultation with the Chief Town Planner under Section 41(1) of the Gujarat Town Planning and Urban Development Act. Shri Chhaya contended that the matter is under consultation with the Chief Town Planner.

7. Shri Bhatt further contended that Section 41(1) of the Gujarat Town Planning and Urban Development Act, 1976 is not applicable because before making any Town Planning Scheme under the provisions of this Act in respect of any area appropriate authority in consultation with the Chief Town Planner may, by resolution, declare its intention to make such a scheme in respect of such area but till date there has been no declaration of intention of the appropriate authority. It is true that such declaration has yet not been made by the appropriate authority but this declaration has to be made by the appropriate authority in consultation with the Chief Town Planner. The process of consultation is already going on and when consultation is over and approval is given by the Chief Town Planner that requisite resolution to declare intention of the appropriate authority is likely to be passed. Consequently action cannot be said to be illegal.

8. Shri M.C. Bhatt further contended that since the Town Planning Scheme was finally sanctioned in the year 1961-62 under the provisions of the Bombay Town Planning Act it has received sanction of law and it cannot be modified except by the authority of law. He has made reference to Section 51(3) of the Bombay Town Planning Act and 65(3) of the Gujarat Town Planning and Urban Development Act. Section 51(3) of the Bombay Town Planning Act 1954 provides that on and after the date fixed in such notification a town planning scheme shall have effect as if it were enacted under this Act. Thus, according to this provision the Town Planning Scheme finalised under this Act shall have the effect as if the same was enacted under this Act. Similar provision is to be found under Section 65(3) of the Gujarat Town Planning and Urban Development Act, 1976. The repeal of Bombay Town Planning Act was made under Section 124 of the Gujarat Town Planning and Urban Development Act. The old Town Planning Scheme which was finally sanctioned and made operative is saved. However, in face of these provisions the power of variation of the Town Planning Scheme as contained in Section 71 of the Gujarat Town Planning and Urban Development Act has not been taken

away by any of these provisions. Even if for a moment it is accepted that Regulation No. 16 is not applicable even then the action of the respondent Corporation in incorporating condition No. 26 in annexure-C cannot be said to be illegal or contrary to the provisions of the Act.

To sum up therefore it can be said that in the first place the petitioner is estopped from challenging the action of the respondent No. 1 in introducing clause (26) in annexure-C for the reasons given in the foregoing portion of this judgement. Secondly the conduct of the petitioner is such which disentitles him from discretionary relief under Articles 226 and 227 of the Constitution of India in view of changing stand that in spite of having agreed to comply with the condition No. 26 of annexure-C he took different stand in rejoinder affidavit that no such agreement was made by him to comply with condition No. 26 of annexure-C. Lastly on merits also the action of the respondent Corporation cannot be said to be illegal or contrary to the provisions of the Gujarat Town Planning and Urban Development Act. As such neither writ of certiorari can be issued quashing condition No. 26 of annexure-C nor writ of mandamus can be issued directing the respondent No. 1 to permit the petitioner to raise construction over the remaining 20 per cent land belonging to him. As such the writ petition is bound to fail. The writ petition is dismissed accordingly with no order as to costs.

00000

[pkn]